

## Legal Sidebar

# Further Pre-Enactment Sex Offender Registration Uncertainty Resolved

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In a case with a number of unusual twists, the U.S. Court of Appeals for the Second Circuit in *U.S. v. Gundy* addressed yet again the question of when the federal Sex Offender Registration and Notification Act (SORNA) requires registration of those convicted of a qualifying sex offense before SORNA was enacted.

Under SORNA, individuals convicted of a state qualifying sex offense must register with state officials shortly before their release from prison. Individuals who ignore their obligation to register and then travel from one state to another are guilty of a federal crime. Exactly when offenders, convicted before SORNA, must report has been the source of some confusion. At first, a few courts believed SORNA's demands encompassed all qualified offenses whether committed before or after the Act's passage in 2006. The Supreme Court corrected this misconception, holding that pre-enactment offenses were not covered until after the Attorney General elected to make SORNA's provisions retroactive. Then, there was some dispute over which of the three Attorney General promulgations first triggered retroactivity. In *Gundy*, the Second Circuit faced the additional issue of whether an offender may be punished for failing to register upon the completion of the first, but not the second, of two consecutive sentences based on the same event.

*Gundy* was convicted of a qualifying Maryland state sex offense in 2005, occurring while he was on federal supervised release for a crime other than a sex offense. A Maryland court sentenced him for the state offense. A federal court sentenced him to a consecutive term for committing the Maryland offense while on federal supervised release. The Attorney General's decision made SORNA retroactively applicable no later than 2008, at which time Gundy was still in custody of Maryland prison officials. Having served his Maryland sentence, state officials transferred him in 2012 to a federal correctional facility in Pennsylvania to begin his federal sentence. Thereafter, federal authorities allowed Gundy to move to a halfway house in New York to serve out the remainder of his time. He never registered in Maryland, Pennsylvania, or New York. Soon after his release in 2013, a federal grand jury indicted Gundy under the statute which outlaws a failure to register and *then* traveling interstate (e.g., from Pennsylvania to New York).

The district court dismissed the indictment because it could not say with certainty that Gundy was under any obligation to register at the time he moved from Pennsylvania to New York. SORNA provides that "[t]he sex offender shall initially register – (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." The district court reasoned that this could mean registration in contemplation of release following service of a sentence or sentences relating to a qualifying offense, that is, registration in contemplation of his release in New York *after* he had traveled from Pennsylvania.

The Second Circuit disagreed. The initial registration section relied upon by the district court regulates the initial process, it does not establish the obligation to register, the court held. Pre-enactment sex offenders are required to register on the date that the Attorney General made SORNA applicable to them, which the court identified as August 1, 2008 at the latest. Thus, Gundy was obligated to register while he was still in Maryland state custody, and certainly before he left Pennsylvania. The Second Circuit left for the district court the question of whether Gundy's journey to New York under the direction, and with the permission, of federal authorities qualified as interstate travel for purposes

of federal criminal prosecution.

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